TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—Continued:

Statutes:

Miscellaneous:

Page

Miscellaneous—Continued:

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-770

ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

NATIONAL CRUSHED STONE ASSOCIATION,
ET AL.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

CONSOLIDATION COAL COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

As this Court concluded in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116-136 (1977), the Clean Water Act, 33 U.S.C. 1251 *et seq.*, directs the Administrator to establish two sets of increasingly stringent effluent limitations (the "1977 limitations" and the "1987 limitations"). Section 301(c) of the Act states that an individual discharger may

obtain a variance from the 1987 limitations based on its economic circumstances so long as the modified 1987 standard represents reasonable further progress beyond the 1977 limitations.[1] Respondents concede (Resp. Br. 24) that Section 301(c) does not apply to the 1977 limitations, and no other express variance provision governs the 1977 limitations. The question posed by this case is whether, notwithstanding that omission, EPA must consider an individual discharger's inability to afford compliance with the 1977 limitations as a basis for lowering the standard in his case.[2]

1. *Section 304(b)(1)(B) of the Act does not require EPA to consider an individual discharger's ability to afford compliance with the 1977 regulations*

Respondents' primary submission (Resp. Br. 17-23) is that Section 304(b)(1)(B) implicitly requires EPA to make the same kind of individualized determination regarding a discharger's financial ability to comply with the 1977

[1]Section 301(c) does not apply to "conventional" (33 U.S.C. (Supp. II) 1311(b)(2)(E)) and "toxic" (33 U.S.C. (Supp. II) 1311(b)(2)(C)) pollutants. See 33 U.S.C. (& Supp. II) 1311(c), 1311(*l*).

[2]Relying on its prior decision in *Appalachian Power Co.* v. *Train*, 545 F. 2d 1351 (4th Cir. 1976), the court of appeals held that the variance clause promulgated by EPA with regard to the 1977 limitations must be at least as flexible and as broad as Section 301(c). See Pet. App. 33a-34a; 545 F. 2d at 1359-1360. Therefore, in the court of appeals' view, EPA must grant a variance from either the 1977 or the 1987 limitations, if the variance requires maximum use of technology within the economic capability of the discharger and represents reasonable progress toward eliminating pollution. In light of their concession that a discharger is not "entitled to a BPT [1977] variance simply because it is financially troubled" and that the 1977 limitations variance clause need not "be identical to Section 301(c)" (Resp. Br. 10), respondents apparently do not fully support the broad holding of the court of appeals. Rather, respondents argue (Resp. Br. 10, 24) that a discharger's inability to comply with the 1977 limitations is merely a nondeterminative factor in the variance process.

mitations that Section 301(c) explicitly requires with egard to the 1987 limitations.[3] Respondents argue that ection 304(b)(1)(B) directs EPA to assess the "total cost" of nplementation—including adverse socio-economic imacts—in setting the 1977 limitations in the first instance, nd that as part of the variance process EPA must econsider every factor it initially considered. We disagree.

a. First, respondents' contention proves too much. To be ure, Section 304(b)(1)(B) mandates "consideration of the otal cost of application of technology in relation to the effluent reduction benefits to be achieved from such application" as a factor in setting the 1977 limitations. But even assuming that "cost" as used in Section 304(b)(1)(B) includes indirect social and economic costs,[4] nothing in the

[3]Respondents also contend (Resp. Br. 23-26) that Section 301(c) somehow applies to the 1977 limitations by analogy. This argument appears premised on an erroneous reading of the Court's decision in *duPont* v. *Train*, *supra*. There, the Court analyzed the relationship between the 1977 limitations and the 1987 limitations, as well as the language, legislative history and administrative interpretation of the Act, in reaching its conclusion that Congress intended EPA to issue both the 1977 and 1987 limitations on an industry-wide and not a plant-by-plant basis (430 U.S. at 124-136). We agree that a comparison of the provisions governing the two limitations requirements may elucidate the meaning of the Act in particular cases; in fact, here the purposeful failure of Congress to extend the coverage of Section 301(c) to the 1977 limitations strongly evidences congressional intent to bar EPA from modifying the 1977 limitations on affordability grounds. But nothing in the *duPont* opinion suggests that the 1977 limitations must be treated like the 1987 limitations for all purposes. To the contrary, the *duPont* opinion expressly recognizes that Section 301(c) applies only to the 1987 limitations. 430 U.S. at 121, 127 n.17.

[4]The phrase "total cost of application" suggests that Congress perhaps was referring only to the financial outlay involved in actually applying the technology. But see 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 231 (Comm. Print 1973) (hereinafter "Leg. Hist.") (remarks of Rep. Jones). In any event, the Administrator has broad discretion under Sections 304(b)(1)(B) and 304(b)(2)(B) to consider any relevant factor in

language of the section suggests EPA must reconsider those indirect costs on a plant-by-plant basis or must otherwise evaluate the financial condition of individual dischargers. To the contrary, "cost" is also a factor to be considered in setting the 1987 limitations (see Section 304(b)(2)(B), 33 U.S.C. (& Supp. II) 1314(b)(2)(B)), but Congress nonetheless deemed it necessary to enact an express variance provision with regard to the 1987 limitations. If respondents were correct that, by specifying "cost" in the broadest sense, as a factor in initially fixing the limitations, Congress meant to require a reassessment of the same "costs" for each discharger, no such variance provision would have been necessary. Cf. *Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980), slip op. 18; *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

b. We further observe that respondents' argument is premised on a basic misunderstanding of the standard variance clause promulgated by EPA with regard to the 1977 limitations. Because EPA cannot evaluate the characteristics of every discharger in a particular industry prior to setting the applicable 1977 limitation,[5] the effluent limitations are necessarily based on general surveys of each

---

establishing the 1977 and 1987 limitations. See 33 U.S.C. (& Supp. II) 1314(b)(1)(B), 1314(b)(2)(B). Pursuant to this authority, EPA estimates the number of business closings that may result from requiring a particular level of technology, thereby ensuring that the 1977 limitation ultimately chosen will not cause a massive shut down of a particular industry. See, *e.g.*, *American Iron & Steel Institute* v. *EPA*, 568 F. 2d 284, 302-304 (3d Cir. 1977). Because the 1977 limitations are ordinarily based on the "average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category" (1 Leg. Hist. 169 (remarks of Sen. Muskie)), the applicable 1977 limitation is by definition affordable by most, if not all, members of the particular industry.

[5]For example, there are approximately 4800 crushed stone and 5000 sand and gravel facilities nationwide (Pet. App. 4a).

industry. See *Weyerhaeuser Co.* v. *Costle*, 590 F. 2d 1011, 1019-1020 (D.C. Cir. 1978); 44 Fed. Reg. 32893 (1979). In accordance with the decision of this Court in *duPont* v. *Train*, *supra*, 430 U.S. at 128,[6] EPA has consistently held that variances from the 1977 limitations are permissible in limited circumstances. Thus, EPA will grant a variance to a discharger that demonstrates that its fiscal cost of actual compliance or the nonwater environmental costs associated with its compliance are substantially greater than the comparable costs for the average industry discharger, provided that such increased costs are attributable to fundamental differences between the characteristics of its plant and the industry-wide characteristics projected by EPA in setting the applicable limitations. See, *e.g.*, *In re Louisiana-Pacific Corp.*, 10 E.R.C. 1841, 1843-1844, 1850-1853 (1977) (Decision of the Administrator); 44 Fed. Reg. 32893-32894 (1979); 43 Fed. Reg. 50042 (1978).

However, contrary to respondents' repeated assertions (Resp. Br. 11, 18, 26), it has never been EPA's position that as part of the variance process it will reconsider *every* factor that may have been considered in setting the particular 1977 limitation. Rather, EPA's variance policy makes clear that a discharger may be entitled to a variance "if the *relevant* statutory factors relating to that discharger are shown to be fundamentally different from those previously considered by EPA." 44 Fed. Reg. 32893 (1979) (emphasis supplied). Based on the language and legislative history of the Act described in our opening brief, EPA has consistently and unequivocally concluded that an individual discharger's

---

[6]Even prior to that decision, EPA had determined to permit some variances, although not on the ground of economic hardship. See 430 U.S. at 122-123. Although the Court in *duPont* agreed with EPA that "some allowance [should be] made for variations in individual plants" (*id.* at 128), it declined to review the scope of the variance clause then in existence. See *id.* at 128 n.19.

bility to afford compliance is simply not a relevant factor. See, *e.g.*, *ibid.*; 43 Fed. Reg. 50042 (1978). Indeed, since EPA (as well as Congress) assumes that some marginal businesses may not be able to afford compliance with the 1977 limitations, it is apparent that the mere economic trouble of an individual discharger cannot be a "fundamentally different" factor to be reconsidered at the variance stage. And, notwithstanding respondents' persistent mischaracterization of the decision in *Weyerhaeuser Co.* v. *Costle*, *supra* (see Resp. Br. 21-22, 26 n.24; Br. in Opp. 7-8), the District of Columbia Circuit has upheld EPA's standard variance clause, explicitly concluding that although a discharger's comparative fiscal cost of compliance is a relevant factor in a variance proceeding, its inability to afford compliance is not. See 590 F. 2d at 1035-1037; F. Grad, *Treatise on Environmental Law* § 3.03, at 3-120.10(4) to 3-120.10(5) (1979). See also *California & Hawaiian Sugar Co.* v. *EPA*, 553 F. 2d 280, 289-290 (2d Cir. 1977); *American Petroleum Institute* v. *EPA*, 540 F. 2d 1023, 1032-1033 (10th Cir. 1976); *American Iron & Steel Institute* v. *EPA*, 526 F. 2d 1027, 1051-1052 (3d Cir. 1975).[7]

[7]Respondents also assert (Resp. Br. 39-40) that EPA's variance clause conflicts with EPA's actual practice. This claim is without merit. In *United States Steel Corp.* v. *Train*, 556 F. 2d 822, 844-847 (7th Cir. 1977), the question presented was whether the discharger's relative cost and difficulty of compliance was based on alleged fundamental differences, and not whether United States Steel could afford compliance. Moreover, in *Jones & Laughlin Steel Corp.*, Doc. Nos. PA-AH-0053, PA-AH-0072 (EPA Reg. III), EPA obtained a financial report regarding the discharger because the administrative law judge agreed to hear evidence regarding the discharger's ability to afford compliance *over EPA's repeated objections*.

2. *The legislative history of the Act compels the conclusion that Congress did not intend that EPA modify the 1977 limitations on the basis of economic distress*

Respondents conclusorily assert (Resp. Br. 33-36) that the contemporaneous legislative history cited in the government's opening brief (Pet. Br. 28-38) is irrelevant. But, as the only two courts of appeals that have considered the pertinent legislative history of the Clean Water Act have concluded (*Weyerhaeuser Co.* v. *Costle*, *supra*, 590 F. 2d at 1036-1037; *American Iron & Steel Institute* v. *EPA*, *supra*, 526 F. 2d at 1051-1052),[8] Congress unequivocally stated its view that EPA need not consider each discharger's economic circumstances and that a discharger that could not afford to comply with the 1977 limitations would be forced to go out of business:

> The Conferees intend that the Administrator * * * will make the determination of the economic impact of [1977] effluent limitations on the basis of classes and categories of point sources, as distinguished from a plant-by-plant determination.
>
> * * * * *
>
> Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. [S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 121, 126 (1972), *reprinted in* 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d

[8]The court below did not cite to any legislative history in either decision or in its earlier decision in *Appalachian Power Co.* v. *Train*, *supra*.

Cong., 1st Sess. 304, 309 (Comm. Print 1973) (hereinafter "Leg. Hist.").]

The Conferees agreed upon [the language in Section 304(b)(1)(B)] * * * to avoid imposing on the Administrator any requirement * * * to determine the economic impact of controls on any individual plant in a single community.

* * * * *

The Conferees intend that the [cost] factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class * * * [e]xcept as provided for in section 301(c) of the Act [1 Leg. Hist. 170, 172 (remarks of Sen. Muskie, primary sponsor of the Act) (quoted with approval in *E.I. duPont deNemours & Co.* v. *Train*, *supra*, 430 U.S. at 130).]

Thus, a plant-by-plant determination of the economic impact of an effluent limitation is neither expected, nor desired, and, in fact, it should be avoided [1 Leg. Hist. 225 (remarks of Rep. Dingell, a sponsor of the Act).]

See generally Pet. Br. 28-38 (detailing Congress' understanding that the 1977 effluent limitations would force marginal operations out of business and that, rather than permit economic variances regarding the 1977 limitations, Congress created an $800 million revolving loan fund for small businesses).[9]

[9]Respondents' attempts (Resp. Br. 33-34) to explain this overwhelming legislative history are disingenuous. Respondents state that the legislative history cited above suggests only that the 1977 limitations not be waived or modified for economic reasons, and that

Nonetheless, and relying almost exclusively on post-enactment legislative history (Resp. Br. 20, 27-32), respondents further contend that the legislative history of the Act supports the decision below.[10] But, as this Court has

what is at issue here is a resetting of the 1977 limitations (*ibid.*). That semantic distinction is illusory. Equally unavailing is respondents' suggestion (Resp. Br. 34) that the decision of the court below would not require a case-by-case determination of the economic circumstances because the discharger and not EPA has the burden of proof in a variance proceeding. The legislative history quoted above and in our opening brief makes clear that the 1977 limitations were not to be modified for affordability reasons, regardless of the burden of proof.

[10]Respondents quote only two items of contemporaneous legislative history. They cite (Resp. Br. 19) a statement from Rep. Jones, a sponsor of the bill, regarding the definition of "total cost." This statement merely observes that in setting the 1977 limitations, EPA must consider "potential unemployment, dislocation, and rural area economic development sustained by the community, area, or region" (1 Leg. Hist. 231). Rep. Jones did not suggest that EPA need reconsider these costs on a plant-by-plant basis. Rather, he explained that all dischargers were required to meet the 1977 limitations or, if they could not afford to comply, to "go out of business" (*ibid.*). Rep. Jones further observed that economic variances were available only with regard to the 1987 limitations and that even under Section 301(c), the variance level had to "represent an upgrading over the July 1, 1977, requirements of 'best practicable control technology' " (1 Leg. Hist. 232).

Respondents also rely (Resp. Br. 35) on a statement in S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971). That Report, which accompanied a predecessor version of the Clean Water Act, states that the Administrator was expected to "define a range of discharge levels, above a certain base level applicable to all plants within that category." S. Rep. No. 92-414, *supra*, at 50, *reprinted in* 2 Leg. Hist. 1468. The Report also observes that in applying this range of discharge levels to a discharger, "the factors cited above should be applied to that specific plant" (*ibid.*). The Report does not, suggest however, that EPA must consider the ability of an individual discharger to afford compliance. To the contrary, it further states that "[i]n no case, however, should any plant be allowed to discharge more pollutants per unit of production than is defined by that base level" (*ibid.*). In any event, the Senate Conference Report that accompanied the enacted version of the Clean Water Act makes clear that no variances from the 1977 limitations may be based on a discharger's inability to afford compliance. See page 7, *supra*; 1 Leg. Hist. 304, 309.

repeatedly warned, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980), slip op. 15; *Andrus* v. *Shell Oil Co.*, No. 78-1815 (June 2, 1980), slip op. 9 n.8. That principle is particularly applicable here.

Thus, respondents claim (Resp. Br. 28-30) that Congress was aware of and approved the Fourth Circuit's prior decision in *Appalachian Power Co.* v. *Costle*, *supra*. Respondents do not cite to any statement by any congressman expressly approving or even referring to that decision, however. Rather, respondents argue that Congress acquiesced in the *Appalachian Power Co.* decision because it allegedly knew about the decision and did not explicitly reject it. Such post-enactment legislative silence is simply too ephemeral a basis for construing the Act, particularly in light of the language and legislative history of the Act canvassed above and in our opening brief. See *Harrison* v. *PPG Industries, Inc.*, No. 78-1918 (May 27, 1980), slip op. 13; *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, *supra*, slip op. 9 n.8; *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 n.11 (1979).[11]

Moreover, it is far from clear that Congress was in any meaningful sense aware of the *Appalachian Power Co.* decision at all, much less that it approved that portion of the case concerning economic variances. Respondents ask (Resp. Br. 29-30) this Court to conclude that Congress focussed on the *Appalachian Power Co.* case merely because one congressman referred to a 126-page 1977 Library of

[11] It is equally reasonable to suppose that Congress silently approved the standard variance provision that had been promulgated by EPA and that was then in effect as to all industries not affected by the *Appalachian Power Co.* decision.

Congress report summarizing 144 reported Clean Water Act decisions, including *Appalachian Power Co.*[12] See *Case Law Under the Federal Water Pollution Control Act Amendments of 1972*, 95th Cong., 1st Sess. (Comm. Print 1977); 3 *A Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Control Act*, 95th Cong., 2d Sess. 374 (1978). The only other evidence cited by respondents (Resp. Br. 28 n.27) regarding Congress' purported awareness of the *Appalachian Power Co.* decision is a letter sent by their lawyers to Sen. Muskie in 1977 concerning a proposed jurisdictional change in the Act. But that letter only mentions the *Appalachian Power Co.* litigation as an example of the kinds of jurisdictional problems that might arise with regard to the proposed legislation and does not mention the variance question posed by this case. See *Federal Water Pollution Control Act Amendments of 1977: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess. Pt. 9, at 17 (1977).

Finally, respondents' claim that "the 1977 Amendments evince a congressional intent to render the Act's effluent limitations more flexible" does not aid their cause. To be sure, Congress in 1977 did modify some of the requirements of the Act. But, as we detailed in our opening brief (Pet Br. 40-42), Congress expressly declined to amend the Act to

[12] The congressman did not discuss *Appalachian Power Co.* or otherwise evidence any knowledge about that particular case.

permit the kind of hardship variance sought by respondents here. Thus, insofar as the 1977 legislative history is relevant, it confirms the correctness of EPA's position.[13]

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

[13]Respondents also cite (Resp. Br. 20) an isolated statement of a congressman made in a 1974 oversight hearing. *Implementation of the Federal Water Pollution Control Act: Hearings Before the Subcomm. on Investigations and Review of the House Comm. on Public Works*, 93d Cong., 2d Sess. 490 (1974). That post-adoptive statement is entitled to little weight. See, *e.g.*., *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203-204 n.24 (1976); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, *supra*, slip op. 15-16 & n.13; *Southeastern Community College* v. *Davis*, *supra*, 442 U.S. at 411 n.11.

END OF CASE